United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

75-1352

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Pts.

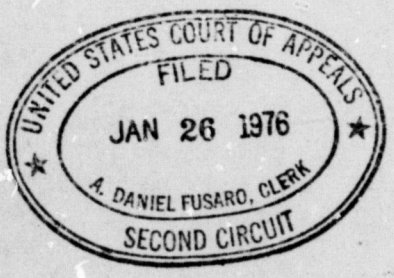
IN THE

UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES OF AMERICA Plaintiff-Appellee	:	
vs	:	CRIMINAL NO. ~~75-1352~~
DONALD RICHARD BRANT Defendant-Appellant	:	

DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC



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3

PETITION FOR REHEARING
EN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure Defendant-Appellant, Donald Richard Brant, hereby petitions for rehearing en banc and shows the court as follows:

On May 28, 1975, Mr. Brant was convicted of conspiracy to rob and robbery of a federally insured bank after a jury trial in the United States District Court for the District of Vermont. Mr. Brant appealed from the conviction and sentence of 20 years imprisonment to this Court. Oral argument was heard on January 9, 1976 after which this Court affirmed the lower court's judgment from the bench without an opinion.

Because the affirmance of Mr. Brant's conviction is inconsistent with and contrary to prior decisions in the Second Circuit, and decisions in other Circuits, Mr. Brant brings this petition for rehearing to secure a uniformity of decisions within the Circuit. In addition, the issues which are presented by this case involve questions of exceptional importance to the administration of criminal justice.

On appeal to this Court Appellant argued that the refusal of the trial judge to poll the jury after learning of certain prejudicial publicity during the

trial was reversable error. This contention arose from the fact that during the holiday which ended on May 27, 1975 the local news media in Burlington, Vermont, where the trial was held publicized an attempted escape by Mr. Brant. There was additional publicity on the morning of May 28 when the trial resumed. The publicity stated that Mr. Brant, on Sunday evening, overpowered a guard and attempted to escape from the Burlington Correctional Center, was apprehended about a block from the Center by Burlington Police and returned to the Correctional Center where he was being incarcerated during the trial.

Defense counsel moved the Court to poll the jury to determine if any of the jurors had heard or read about the attempted escape. Although the Judge himself had read about the attempted escape in the area's only daily newspaper, he rejected defense counsel's motion and refused to poll the jury. The Court, instead, followed the advice of the United States Attorney who suggested that the Court proceed as if nothing happened in the hope that "we would ride over this problem as smoothly as possible".

Appellant contends that this Court's affirmance of the lower court's decision contravenes the accepted and required practice of the Second Circuit and fails

to establish an easily administered but necessary procedure to guarantee that a jury verdict in a criminal trial is based only upon the evidence presented in Court. In their briefs neither the United States Attorney nor the defense counsel was able to find a decision which sustained the actions of a trial judge who refused the motions of defendant's counsel to poll the jury after the judge himself had read the prejudicial material prior to the motion. In fact, the procedure followed in the instant case was completely inconsistent with the Second Circuit rule as enunciated in the case of United States vs. Palmieri, 456 F.2d 9 (2d Cir. 1972) in which this Court stated:

> "Where juries are not generally sequestered (e.g. Connecticut; the Southern District of New York), and the trial judge can anticipate prejudicial publicity, he might inform the jury of its duty not to read or listen to any story about the trial, tell the jurors on their oath that he will ask them on their oaths the following morning if they have read or listened to any such stories, and then do just that before starting the next day's trial." [Emphasis added] Id at 14 N.3

Throughout the trial the Court properly admonished the jurors at each recess that they should not discuss the case among themselves or with others or listen to anything or read anything about the case. Such admoni-

tions, however, do not provide adequate prophylactic measures to determine whether or not the publicity infected the jury. The frequent admonitions given to the jury laid the foundation for the Court to follow the rule in Palmieri without creating undue suspicion or increasing possible interest in the publicity. Instead, the Court allowed the case to go to the jury despite the rule in Palmieri and without knowing the extent of the infection.

Appellant does not contend that a finding that some of the jurors had in fact read the newspaper articles would be grounds for a mistrial. Appellant merely contends that it was impossible to determine whether prejudice against the defendant existed unless the Court took affirmative action and polled the jury. The publicity was more than just background information. The possibility of prejudice was strong in that an alleged escape, as reported in the newspaper, would give rise to the inference that a person on trial would attempt to escape only if he felt he was guilty. Since the jury had not be sequestered, some or all of the jurors might have drawn such an inference. Only a poll of the jury could determine the extent, if any, of prejudice. Where the trial court has polled jurors individually,

admonished them, and in the proper exercise of its discretion, continued with trial, verdicts have been upheld. See United States v. Postma, 242 F.2d 488 (2nd Cir. 1957); United States v. Feldman, 299 F.2d 914 (2nd Cir. 1962).

Moreover, at least three other Circuits have held that the trial court has an affirmative duty to ascertain the existence of improper influences upon the jurors' deliberative qualifications and to take whatever steps, in its discretion, are necessary to insure that the balance is not weighed against the accused. United States ex. rel. Doggett v. Yeager, 472 F.2d 299 (3rd Cir. 1973); United States v Hankish, 502 F.2d 71 (4th Cir. 1974); Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968).

The Doggett case, supra, 472 F.2d 299 (3rd Cir. 1973) is worthy of particular note. In that case, the court considered and quoted a number of sections from the American Bar Association project on standards for criminal justice and standards relating to fair trial and free press. Among the standards is the following,

> 3.5(f): "[I]f it is determined that the material disseminated during the trial goes beyond the record on which the case is to be submitted to the jury and raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the

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UNITED STATES OF AMERICA	)	
	)	
VS	)	DOCKET NO. 75-1382
	)	
DONALD RICHARD BRANT	)	

CERTIFICATE OF SERVICE

I, Alden T. Bryan, Esq., a member of the firm of Hoff, Curtis, Bryan, Quinn & Jenkins, certify and say that on the 21st day of January, 1976, I served a copy of the foregoing Petition for Rehearing En Banc on the Honorable George W. F. Cook, United States Attorney, Federal Building, Rutland, Vermont 05701, by placing two copies of the same in an envelope properly addressed and prepaid and placing the same in the United States mail for delivery.

Bret P. Powell

for: Alden T. Bryan, Esq.

presence of the others, about his exposure to the material." [Emphasis by the Court] Doggett, supra at 235.

This Court's decision in the instant case, therefore misapprehends the rule previously established in this Circuit and is contrary to decisions in other Circuits which have addressed the issue, and, further, is inconsistent with standards recommended by the American Bar Association. This inconsistency creates uncertainty as to the standards which must be applied by federal trial courts in this Circuit. Accordingly, it is a matter of exceptional importance to the administration of criminal justice.

WHEREFORE, Defendant-Appellant petitions the Court for a rehearing en banc.

Dated: January 21, 1976.

HOFF, CURTIS, BRYAN, QUINN & JENKINS

By: Bret P. Powell
for: Alden T. Bryan, Esq.
Attorneys for Defendant-Appellant

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WHEREFORE, Defendant-Appellant petitions the Court for a rehearing en banc.

Dated: January 21, 1976.

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Attorneys for Defendant-Appellant